

**ARIZONA SUPREME COURT**  
***Committee on the Impact of Wireless Mobile Technologies and Social Media***  
***on Court Proceedings***

Minutes  
November 7, 2012

Members present:

Hon. Robert Brutinel, Chair  
Hon. Janet Barton  
Hon. Dan Dodge  
Hon. Margaret Downie  
Hon. Michael Jeanes  
Hon. Eric Jeffery  
Hon. Scott Rash

Members present (cont'd):

Karen Arra  
David Bodney  
Joe Kanefield  
Robert Lawless  
Robin Phillips  
George Riemer

Guests:

Jennifer Liewer  
Theresa Barrett

Staff:

Mark Meltzer  
Ashley Dammen  
Julie Graber

Members not present:

Hon. James Conlogue  
Kathy Pollard  
Marla Randall

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**1. Call to Order; approval of meeting minutes:** The Chair called the meeting to order at 10:10 a.m. The Chair asked the members to review the draft minutes of the September 28 meeting.

**Motion:** A member made a motion to approve the September 28 minutes. The motion received a second and it passed unanimously. **Wireless 12-011**

**2. Draft letter to the Judicial Ethics Advisory Committee:** The members proceeded to discuss a draft letter to the Judicial Ethics Advisory Committee ("JEAC") requesting an omnibus advisory opinion on the use of social media by judges and courtroom staff. The members discussed ethics opinions from other jurisdictions, including a recent one from Ohio, which have varying conclusions. The members offered the following comments during this discussion:

- Is it possible, necessary, or appropriate for Arizona to have a social media policy for its judges and court staff?
- What are the implications when the public associates a social media post with a judge, even if the judge's capacity is not expressly identified?
- Should the same social media policy govern both elected judges as well as judges appointed by merit selection?

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- What restrictions should apply to a judge or a clerk during an election campaign or during an elected official's term in office? How should those restrictions apply if the judge or clerk's election opponent is using social media?
- Should a policy distinguish between courtroom staff and staff who are not present in the courtroom?

The members agreed that there are numerous scenarios and distinctions, and that an advisory opinion could not cover every factual permutation. Mr. Riemer offered to compile the opinions from other jurisdictions and provide them to the JEAC. He is already gathering information, and the JEAC will look for the Wireless Committee's letter requesting an advisory sometime in January.

**3. Jury admonition:** The members proceeded to the subject of the jury admonition. Staff played a video recording by Paula Hannaford-Agor, the director of the National Center for State Courts Center for Jury Studies, on Juror and Jury Use of New Media. Ms. Hannaford-Agor posed questions about why jurors use social media, and the impact their use of social media might have on a jury's decision-making. She hypothesized that in some cases, the risk of compromising the jury's impartiality might be high, and in other cases, a jury's use of social media might have no impact. If a juror uses social media, will they find any information about the case? If they do, will they share it with other jurors, and if so, will it affect the fairness of the proceeding and the integrity of the verdict?

The committee members then discussed the video, and whether in the future, a court might permit jurors, perhaps experimentally, to use social media during a trial. One member commented that the desire to communicate with others drives the use of social media, and courts should recognize this need, possibly by allowing partial but not complete use.

The Chair requested staff to describe changes to the draft jury admonition. The jury admonition, as well as the drafts of Supreme Court Rules 122 and 122.1, had been considered during the preceding weeks at meetings of the Arizona Association of Superior Court Administrators, the Committee on Limited Jurisdiction Courts, the Committee on Superior Court, and the Limited Jurisdiction Courts Administrators Association, as well as at a meeting of presiding judges of the superior court.

The members reviewed a mark-up version of the jury admonition showing changes made during the September 28 meeting, as well as further modifications made by staff as a result of comments received during the foregoing meetings. Some of these changes were stylistic or improved the organization of the admonition. The warning about not taking photos or videos was removed. There was a revision to the language regarding "friending." The revised admonition included a sentence that advised jurors that if they had a question or needed additional information, they should submit the question or request in writing. The admonition added a sentence explaining that the court instruction to jurors not to look for information outside the courtroom was not a suggestion that there was other information that a juror could find.

**4. Rule 122:** Next, the members considered revisions to the draft of Supreme Court Rule 122.

The members discussed which judge would approve the use of a camera in the courtroom while the court is not in session. The members agreed that if the proposed camera use does not arise from a proceeding in the courtroom, the person making the request should present it to the presiding judge or a designee.

The members then discussed whether the requirements of the draft rule should apply to devices that are used solely for audio recording. On the one hand, there is a desire for transparency in court proceedings. On the other, judges should be aware of any recording that occurs inside a courtroom. For example, judges should have control of audio recordings if there are bench conferences, or off-the-record or privileged conversations; otherwise, members of the public could post or broadcast these conferences or conversations without limitation. Members noted that audio recording technology is sophisticated enough to make good quality recordings from the gallery, and the judge should therefore be notified before this occurs.

After further discussion, the members agreed that a formal request process was not necessary for a person wishing to audio record a proceeding. However, any person, including a journalist, would be required to notify the court that they were using a personal audio recorder in the courtroom. This would allow the court to advise those persons that they are subject to the provisions of Rule 122, section (l). This abbreviated process would also alert the parties that someone was making an audio recording. The proposed rule would not authorize the judge to prohibit use of a personal audio recorder, but rather would serve only to provide notice of use. The members discussed whether a sign would be necessary to inform members of the public of the requirement to notify the court. The members decided that a sign or information on the court's website would be optional ways of notifying the public, although the rule itself is probably sufficient notice, but that each court could develop its own preferred method of providing notice.

Judge Dodge commented that the younger generations may not equate a camera with a video recording device, and he suggested that the revised rule's title refer to a "recording device" rather than to a "camera." The members had no objection to this change. The members also considered adding a definition for a "personal recording device." An audio recording device that is not on the person of an individual in the gallery, but that requires a microphone in the well of the courtroom, would be subject to the request requirement under section (c). Staff will revise the draft rule accordingly.

The members proceeded to discuss the rights of victims under Rule 122. In addition to the word "victim" appearing in section (l)(5) of the draft, the most recent version also added "victim" to two of the factors in section (e). [These draft provisions now say, "The impact of coverage upon the right of privacy of any party, victim, or witness;" and "the impact of coverage upon the safety and well-being of any party, victim, witness, or juror..."] One member commented that the court always grants a victim's request that he or she not be photographed; why then should the judge have discretion under section (e) to deny such a request? The members agreed that the

judge should not be required to provide specific findings under section (e) to deny a request to photograph a victim, but that the court should be required to consider the factors. In a criminal proceeding, minute entries routinely include express prohibitions regarding photographs or video of victims, and proposed section (l)(5) would allow a judge on his or her own motion to deny a request to photograph victims.

Staff also noted a revision to section (b)(4). The revision has the effect of excluding the court from the requirements of section (c), that is, a court can record and broadcast its own proceedings. Staff advised that this addition resulted from information that at least one municipality is contemplating a broadcast of some of its city court proceedings. The members discussed whether that court should be required in this circumstance to advise participants and the public of the broadcast. The members declined to require this; if municipalities have concerns, they may wish to get advice from their city attorney. The second sentence of revised section (b)(4), which provided that “a court may provide coverage of its own proceedings, and it is exempt from the requirements of section (c),” was moved to section (c).

**5. Rule 122.1:** The members also considered a revised version of Supreme Court Rule 122.1 concerning use of portable electronic devices in the courtroom and courthouse. Staff described changes to the present version of this new rule made during the September 28 meeting as well as subsequently. Staff noted language in section (c) that was added in response to comments by judges during the vetting process. The additional language stated, “A party or a member of the public may not photograph or video record a judge, a judicial employee, an attorney, a party or an opposing party, a victim, a witness, a juror, or a peace officer anywhere in the courthouse without the person’s consent. A violation of this section presumptively obstructs the administration of justice, and lessens the dignity and authority of the court.” The members suggested substituting the words “another person” in lieu of this list of specific individuals.

**Motion:** A member moved to add the word “knowingly” to this provision. Rule 122.1 would therefore prohibit anyone from “knowingly” taking photographs or making recordings of another person anywhere in the courthouse without that person’s consent, except as allowed under Rule 122. The motion received a second and it passed with two nays. **Wireless 12-012**

The members also discussed section (e) of this proposed rule, and specifically a recommendation by the Committee on Limited Jurisdiction Courts (“LJC”) that a judge have authority to “prohibit” activity rather than “terminate” activity that may be disruptive or distracting to a court proceeding. Judge Jeffery, who also serves on the LJC, explained the reasons for this recommendation. The consensus of the members was not to fashion a blanket prohibition of using devices in court, but to allow prohibition following a pattern of disruptive activity.

**Motion:** A member moved to keep the language as currently written. The current language gives a judge authority to terminate activity, rather than prohibit activity, which may be disruptive or distracting to a court proceeding. The motion received a second and it passed with one nay. **Wireless 12-013**

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Regarding the prohibition in section (e) about making or receiving phone calls while court is in session, the members agreed to add the words “without permission of the court.” **6. Consideration of statutes:** Two recent articles concerning use of social media were included in the meeting materials. One of these articles involved a juror anonymously blogging about a trial, and whether a judge could compel a newspaper to disclose the author of the blog; the other article concerned a threat made to a juror on Facebook. The members briefly discussed whether Arizona statutes addressed these electronic communication scenarios. One member noted that a few unsatisfied litigants have created Facebook pages concerning family court judges. While there are free speech considerations, actions such as threatening a judge or a juror could be criminally prohibited. The members took no action today on this topic.

**7. Roadmap:** Staff noted that November 26 is the deadline for submission of a final version of the Wireless Committee’s report to the Arizona Judicial Council, for consideration at its meeting on December 13, 2012. The Chair requested authority to finalize the report and appendices.

**Motion:** A member moved to provide the Chair with the authority to finalize the report. The motion received a second and it passed unanimously. **Wireless 12-014**

**8. Call to the Public; Adjourn:** There was no response to a call to the public. The meeting adjourned at 2:15 p.m. Staff will schedule a meeting following the conclusion of the initial comment period, and will notify the members of that date.